No. 2524.

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO-OREGON LIGHT AND POWER COMPANY, IDAHO RAILWAY, LIGHT & POWER COMPANY and O. G. F. MARKHUS, as Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY,

Appellants,

vs.

STATE BANK OF CHICAGO, BANKERS TRUST COMPANY, F. N. B. CLOSE, A. W. PRIEST, WILLIAM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, W. D. WILLARD, Personally and as a Bondholders Committee, W. J. FERRIS as Receiver of IDAHO-OREGON LIGHT & POWER COMPANY, UNITED STATES OF AMERICA, IDAHO POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Appellees.

A. W. PRIEST, W. D. WILLARD, WM H. FORSTER, H. D. MILES, EDWARD J. MULLER, GEORGE E. FISHER, D. M. LORD, JOHN R. ALLEN, W. O. CARRIER, ALLEN HOLLIS, CHARLES L. PARMELEE and CHARLES M. SMITH, Interveners, and Being a Protective Committee for the Holders of the First and Refunding Bonds of the IDAHO-OREGON LIGHT & POWER COMPANY,

Cross-Appellants,

vs.

IDAHO RAILWAY, LIGHT & POWER COMPANY, O. G. F. MARKHUS, Receiver of IDAHO RAILWAY, LIGHT & POWER COMPANY, IDAHO-OREGON LIGHT & POWER COMPANY and W. J. FERRIS, Its Receiver, BANKERS TRUST COMPANY, F. N. B. CLOSE, UNITED STATES OF AMERICA, IDAHO, POWER & LIGHT COMPANY, GENERAL ELECTRIC COMPANY, WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY, A. H. SUNDLES and AMERICAN STEEL & WIRE COMPANY,

Cross-Appellees.

Petition for Re-Hearing.

JOHN F. MacLANE,
Solicitor for Idaho Railway, Light & Power Company and O. G. F. Markhus, as Receiver of Idaho Railway, Light & Power Company, Appellants.

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Cross-Appellees.

Petition for Rehearing.

Now comes Idaho Railway, Light and Power Company and O. G. F. Markhus, as Receiver thereof, and, by their solicitor, John F. MacLane, respectfully peti-

tion this Honorable Court for a rehearing of the above entitled cause upon the ground that the said Court has, in its previous consideration thereof, overlooked the following points:

First: That, as your petitioners understand its conclusions, they are based primarily upon a finding that, as a matter of fact, the Idaho-Oregon Light and Power Company was insolvent on September 25, 1912, and that the contract then made between the Idaho-Oregon Railway Company and the Bankers was made in contemplation of a reorganization or readjustment of its securities or corporate relationships.

Your petitioners respectfully allege and show that there is in the record no evidence of insolvency of the said corporation in September, 1912, in the sense that it had then been determined that its corporate business could not or would not be continued, and that this Honorable Court has based its contrary conclusion upon an erroneous assumption as to the existence of such facts. The opinion of the Court states that:

> "It appears that the appellants conceded in the court below that on September 25, 1912, the directors of the Railway Company had come to the conclusion that the Power Company could not go on with its business, and that the course then inaugurated and subsequently pursued was adopted by the directors for the purpose of protecting themselves 'as they had a right to do.'"

Your petitioners respectfully show that, so far as they can learn, the foregoing statement in this Court's

opinion is based upon the following statement—found at pages 11 and 12 of the Brief in Reply on behalf of the appellees, viz.:

> " Upon the trial in the District Court counsel for the Railway Company, consistently with the Railway Company's attitude throughout the trial and consistently with the present attitude as shown by the foregoing quotations from the Railway Company's brief, stated upon the argument that the Railway people at the time of the first transaction involving an exchange of bonds on September 25, 1912, had come to the conclusion that the Idaho-Oregon Company could not go on with its business, and that the course then inaugurated and subsequently pursued was in pursuance of that conclusion and adopted for the purpose of protecting themselves, *as they had a right to do.*"

Your petitioners further show that the said statements contained in the said brief of appellee's counsel are not supported by reference to any part of the record, and that the Court will search the record in vain for any justification therefor.

This Honorable Court, in its opinion, further states that:

> " It is true that there is in the record no direct or positive testimony that at any time in the year 1912 the directors of the Power Company admitted its insolvency, or that they then contemplated immediate insolvency, but there is suffi-

cient to show that the Company, to their knowledge, was in financial embarrassment and in failing circumstances; that its income was insufficient to meet its obligations and current expenses; that, *in view of the competition which was presented, its directors saw no way of escape from immediate insolvency unless by a scheme of reorganization or possible consolidation with the competing company.*"

Your petitioners respectfully show that the Court fell into error in making the portion of the foregoing statement which is italicised; that the record contains no evidence supporting the statement, but, on the contrary, that the evidence in the case shows that the officers and directors of the Idaho-Oregon Light and Power Company, both in September and in December, 1912, considered and expected that the said Company would be maintained as a going concern without thought or expectation of reorganization or consolidation.

That the fact that the corporation was in financial embarrassment and in failing circumstances and that its income was insufficient to meet its obligations and current expenses is insufficient evidence of insolvency upon which to predicate the right of a creditor to avoid a particular transaction, is abundantly established by the following cases:

Coler v. Allen, 114 Fed. 609 (decided by this Court).

Damarin v. Huron Iron Co., 47 Ohio St. 581.

Wilmott v. London Celluloid Co., L. R., 34 Ch. Div. 147.

SECOND: The opinion of this Court further states that:

> "While the directors of a corporation are not trustees for bondholders in the sense that they are trustees for stockholders, it does not follow that bondholders shall be denied protection against the acts of directors, *the intention and effect of which is to depreciate the bonds contrary to the terms of the mortgage under which they are issued.*"

Your petitioners respectfully show that, from the foregoing quoted statement and particularly the italicised portion thereof, they understand this Court to have found that the acts of which the appellees complain were contrary to the terms of the mortgage under which the bonds held by the intervenors were issued and were intended to depreciate the value of such bonds. Your petitioners respectfully show that, in reaching such conclusion, this Honorable Court overlooked the following points, viz.:

> (*a*) That the 718 bonds had been *duly issued* at the time of the transactions of which complaint is made.

$24,000 of the bonds in question had been issued for the purpose of retiring underlying bonds (record, p. 397); the balance of the bonds involved had been issued either for the purchase or acquisition of other property, the payment of outstanding indebtedness secured by a lien on the properties purchased, or for ninety per cent. of

amounts expended by the company for additions, improvements or extensions (record, pp. 390–393).

The distinction between the *issuance* and *disposition* of the bonds is a vital one insofar as the interests of the intervenors are concerned, because they were parties to the contract which regulated such issue and, therefore, are entitled to complain if, as the Court appears to have considered, it was violated. Having, however, been properly issued, the interest of the intervenors in the bonds ceased and the question of their proper disposition became one between the corporation and those who acquired them. The distinction is taken in the case of *Keystone National Bank v. Palos Coal Co.*, 43 So., 570 (pp. 122 and 123 of brief of *amicus curiae*), where (p. 571) the Court said:

> "While the bill prays specifically for the annulment of certain bonds held by the respondents, the relief sought in this respect is inappropriate to the fact stated in the bill. The bond issue was for corporate purposes and benefits, and was made under corporate authority, and it is not contended. As shown by the facts stated in the bill, that there was any illegality in the issue of the bonds. *The facts stated do not show an illegal issue, but rather an illegal disposition of the bonds after the same had been legally issued.* If the bonds were hypothecated without consideration, and in this manner parted with and disposed of, this would be a corporate wrong. The remedy in such a case, it would seem, would not be the annulment of the bonds, but a restora-

tion of the bonds to the rightful custodian, and *the relief should be sought and had in the name of the corporation.*"

(*b*) If the bonds were an obligation of the corporation at the time of the transactions in qeestion, such transactions could not have resulted in depreciating the value of the intervenors' bonds.

It is respectfully submitted that the Court has overlooked the case of *Trust Company of America v. United Box Board Co.*, 162 N. Y. App. Div., 855, cited and referred to at pages 129–132 of the brief of *amicus curiae*, where it seems to have been held that bonds issued against the acquisition of property, although in the possession of the mortgagor company or its sucessors, are entitled to participate in the distribution of the proceeds of the sale of the mortgaged property to the same extent as bonds of the same issue in the hands of third persons.

(*c*) The learned Court appears to have overlooked the case of *Bank of Toronto v. Cobourg, etc., Ry. Co.*, 10 Ont., 376, referred to at length at pages 105–110 inclusive of the brief of *amicus curiae*, where were advanced precisely the contentions made in behalf of the intervenors and precisely the arguments submitted on behalf of the appellants, and where a conclusion was reached, as your petitioners respectfully submit, directly contrary to that heretofore announced by this Court.

(*d*) That the Court has overlooked the case of *In re Regent's Canal Iron Works Co.*, 3 Ch.

Div., 43, referred to at pages 111–113 of the brief of *amicus curiae*, in which, so far as the principle involved is concerned, as your petitioners respectfully submit, precisely the same question was presented as in this case, and in which a conclusion was reached directly contrary to that heretofore announced by this Court in this case.

THIRD: Your petitioners respectfully submit that this Court has overlooked the fact that none of the cases cited in its opinion hold that a bondholder may complain of the disposition by the mortgagor of bonds of the same issue after they have been duly issued and placed in the possession of the mortgagor.

From the report of *Richardson v. Greene*, 133 U. S. 30, it is difficult to determine what parties raised particular issues. As, however, there were before the Court those entitled to present the issues determined and the opinion does not suggest that the facts require the Court to distinguish between the *issuance* and *disposition* of bonds, it is only proper to assume that, if bondholders presented any of the questions there determined, their position was that the transactions which are complained of resulted in an improper issue of the bonds and, therefore, in a breach of their contract. In any event, a most careful reading of the case will disclose that the Court had no intention of stating or suggesting that any right of action to redress a corporate wrong can be asserted by bondholders.

Thomas v. Brownville & R. R. Co., 109 U. S. 522, contains no statement or suggestion that bondholders may redress a corporate wrong. On the contrary, after stating that transactions such as there under review

are not void, but voidable at the option of those whose interests are affected, the court (p. 524) says:

> " In the present case the stockholders of the corporation whose officers accepted those benefits at the hands of the parties with whom they were, in the name of the corporation, making a contract for over a million dollars, *do denounce and repudiate that contract.*"

McGourkey v. Toledo & Ohio Ry. Co., 146 U. S., 536, concerned the construction of a first mortgage and the determination whether or not particular property, sought by an arrangement between the corporation and its directors to be withheld from the lien of the mortgage, had come under such lien; and it was determined that the first mortgage covered the property in question. Obviously, that was a question in which the first mortgage bondholders were interested and its determination involved primarily the construction of their contract with the mortgagor. Accordingly, the language of the opinion in that case quoted by this Court, when considered in the light of the facts with which the Supreme Court was there dealing, is not authority for the proposition that bondholders are entitled to redress corporate wrongs.

Consolidated Tank Line Co. v. Kansas City Varnish Co., 45 Fed. 7, and *Bosworth v. National Bank*, 64 Fed. 615, are cases of so-called inequitable preference. Both are grounded upon *Lippincott v. Shaw Carriage Co.*, 25 Fed. 577, and *Sanford Fork and Tool Co. v. Howe, Brown & Co.*, 44 Fed. 231, both of which were decided by Mr. Justice Woods, who appears to be re-

sponsible for the doctrine of so-called inequitable preference. Neither the *Consolidated Tank Line* case nor the *Bosworth* case mention the fact that the *Sanford Fork* case was reversed by the Supreme Court of the United States (157 U. S. 212), and, possibly, such reversal had not occurred when they were decided. Your petitioners respectfully submit that the doctrine of inequitable preference has not been accepted by the Supreme Court of the United States, and that, in view of the foregoing, the *Consolidated Tank Line* case and the *Bosworth* case are not controlling authorities bearing upon the questions at issue in the case at bar.

FOURTH: Your petitioners respectfully request this Court to reconsider generally Points IV and V as discussed in the brief of *amicus curiae*, upon the ground that the controlling authorities mentioned therein have been overlooked.

WHEREFORE, upon the foregoing grounds, the said appellants and petitioners respectfully pray this Honorable Court to grant a rehearing of said cause.

IDAHO RAILWAY, LIGHT AND POWER COMPANY and
O. G. F. MARKHUS, as Receiver of said Company,
by JOHN F. MACLANE,
their solicitor.

I, JOHN F. MACLANE, of counsel for the appellants named in the foregoing petition, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for purposes of delay.

JOHN F. MACLANE.